APPENDIX 1 — IMPLICATIONS OF DECISION IN *NEDC V. BROWN* TO SILVICULTURAL ACTIVITIES ON NATIONAL FOREST SYSTEM LAND, U.S. FOREST SERVICE, SEPT. 7, 2010

Forest Service
Washington Office
1400 Independence Avenue, SW
Washington, DC 20250

File Code: 1570-1 Date: September 17, 2010

Route To:

Subject: Implications of Decision in Northwest Environmental Defense Center v. Brown to Silvicultural Activities on National Forest System Land

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs and WO Directors

On August 17, 2010, the United States Court of Appeals for the Ninth Circuit (9th Circuit), in *Northwest Environmental Defense Center v. Brown* (*NEDC*), 07-35266 (9th Circuit), ruled that it considers storm water runoff from logging roads to be a discharge of pollutants from a point source when collected by ditches, canals, and culverts and discharged into streams. As such, the 9th Circuit ruled that these discharges are subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA)

regulations at Title 40, Code of Federal Regulations, Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements prior to this ruling. The Court held that the Silvicultural Rule violates CWA.

Although the Forest Service was not a party to *NEDC*, several questions have arisen about application of the decision to silvicultural activities on National Forest System land and its impacts on State, private, Tribal, and forest lands under other jurisdictions. The enclosed document, prepared by the Forest Service and the Office of General Counsel, addresses questions that field units have asked about *NEDC*.

Because the Forest Service was not a party, the Agency is not immediately impacted by the 9th Circuit decision in this case. At this time it is recommended that Forest Service personnel:

- Continue the use of best management practices, compliance monitoring, and update of National Best Management Practices Handbook and Monitoring Protocols.

- Work with EPA regional offices and States with delegated permitting authority to address permitting for logging road ditches and culverts.

- Continue to coordinate closely with EPA regarding best management practices.

Appendix 1

If you have further questions regarding *NEDC* and its impact on the Forest Service, please contact your regional Office of General Counsel.

/s/Richard J. Cook (for) Tony Tooke
TONY TOOKE
Director for Ecosystem Management Coordination

cc: Anne Zimmermann
Richard Sowa
Tom Peterson

Appendix 1

Q&As: 9th Circuit's August 17, 2010 decision in

Northwest Environmental Defense Center v. Brown

Date: September 7, 2010

Issue: The 9th Circuit ruled that it considers storm water runoff from logging roads collected by ditches and culverts and discharged into streams to be a discharge of pollutants from a point source subject to permitting requirements of the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES). Environmental Protection Agency (EPA) regulations at Title 40, Code of Federal Regulations (CFR), Section 122.27 (the "Silvicultural Rule,") exempted such discharges from the CWA's permitting requirements. The court held this exemption violates CWA.

Q: Was the Federal Government a Party to this litigation?

A: No. Neither EPA nor the Forest Service (FS) was a party in this lawsuit. This case involved environmental groups, private timber operators, and Oregon state officials. The FS is not *immediately* bound by this ruling. However, it could have impacts on FS activities.

Q: Did the 9th Circuit issue a nationwide injunction?

A: No. The 9th Circuit did not issue a nationwide injunction of the regulations at 40 CFR §122.27, but remanded the case to the District Court for further proceedings. The

9th Circuit has not issued any injunction, final order, or mandate. It is unclear when the District Court of Oregon will act or how those further proceedings may impact the FS or private entities.

Q: How might this lawsuit impact FS operations?

A: The FS will likely need to obtain a permit for the discharge of storm water from logging roads, which is channeled through a system of culverts, pipelines, ditches, or other diversions. Although the decision in this particular lawsuit did not immediately bind the Agency, the FS has received its first notice of legal challenge to road construction and maintenance activities based on this decision and anticipates additional challenges within the 9th Circuit. States located within the jurisdiction of the 9th Circuit Court of Appeals include Arizona, California, Nevada, Oregon, Idaho, Washington, Montana, Alaska, and Hawaii.

Q: If the FS needs to obtain NPDES permits for its logging roads, how long will that take?

A: The FS is still evaluating the answer to this question. EPA has delegated NPDES permitting authority affecting National Forest System lands to the State governments of all but four States (ID, NM, Mass., and NH) and has retained it in most of the territories (including Puerto Rico). Each State has a different process and timeline in place for issuing permits. Some States may determine that a general permit for logging roads is appropriate, while others may determine that individual roads or timber

projects require road-specific or project-specific permits. The FS will have to work closely with EPA and the States to efficiently obtain permits where necessary.

If the FS is required to obtain programmatic permits by State, we may have to work with 46 States and the process could take several years. If the FS is required to obtain permits on a road by road basis, that would mean obtaining up to 400,000 permits. This would likely take more than 10 years. There would also be an ongoing workload to maintain and administer these permits.

States located within the jurisdiction of the 9th Circuit Court of Appeals should be prioritized for any permitting activity.

Q: If the FS must obtain NPDES permits for its logging roads, how much will it cost?

A: The FS is still evaluating the answer to this question. See answer above.

Q: How will this ruling impact private timberlands?

A: Timber companies and others conducting silvicultural operations on private timber lands will likely be impacted in a manner similar to the FS, in that under this ruling, they must obtain a NPDES permit for storm water runoff associated with silvicultural activities and logging roads discharged to waters of the United States through a system of culverts, ditches, and canals. There are

approximately 260 million acres of private woodlands across the United States. They are accessed by a road network that consists of Federal, State, county, and private roads. Interior roads accessing these acres are low-volume timber access roads similar to roads found within the Federal estate which access comparable forested lands. Similar challenges will exist with NPDES permitting on these lands when ditch and culvert templates are used for drainage and travel way stability. The FS currently has inventoried approximately 378,000 miles of roads under its jurisdiction of approximately 193 million acres. Although no comprehensive database of roads traversing private timber roads exists, it is reasonable to extrapolate that private owners will have a proportionate number of roads needed to access their timber. The specific issue before the 9th Circuit involved private entities and the State of Oregon, and the Court's ruling may eventually affect all entities involved in resource management, whether private, State, or Federal.

Q: Must the FS stop building logging roads to wait for permits from the States or EPA?

A: No. The ruling does not immediately apply to the FS. The Circuit Court remanded the case to the District Court of Oregon for further proceedings. The District Court's future opinions may be instructive as to when and how the ruling might take effect. The FS, in the interim, should coordinate closely with EPA to determine the most efficient way to move forward.

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Q: Does the 9th Circuit's ruling apply to new, existing, or reconstruction of logging roads?

A: The opinion does not distinguish between new, existing, or reconstruction of logging roads, but concluded that storm water runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which a NPDES permit is required. The lawsuit challenged private timber operators' failure to obtain a NPDES permit for existing logging roads.

Q: Have EPA or the States permitted discharge of storm water from logging roads before?

A: No. Prior to the Court's August 17, 2010, opinion, the Silvicultural Rule at 40 CFR §122.27 was in effect and no permit was required. The Silvicultural Rule was an exemption to the CWA's permitting requirements, and was based upon Best Management Practices that EPA and the FS had agreed upon, and which the FS already had in place.

Q: How will this Ruling change storm water management activities on the ground?

A: This ruling should not affect road management practices. The FS currently uses best management practices (BMPs) and will continue to implement them to minimize sediment delivery to streams.

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Q: Is there any chance that this decision could be overturned after further review by a higher-level court?

A: This is unknown, but unlikely at this time. This decision was decided by the 9th Circuit Court of Appeals. Additional review by either the 9th Circuit or the Supreme Court is very rarely granted, and the Federal Government has almost no ability to request further review of this decision because it was not a party to the litigation.

APPENDIX 2 — SIXTY DAY NOTICE OF INTENT TO SUE, AUG. 20, 2010

Law Office of Dana Johnson, PLLC

Danna M. Johnson, Attorney at Law

August 20, 2010

VIA CERTIFIED MAIL

Chief Tom Tidwell
USDA Forest Service
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Washington., DC 20250

Ranotta McNair, Forest Supervisor
Idaho Panhandle National Forest
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Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave,, SW
Washington, D.C. 20240

Secretary Ken Salazar
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

RE: Sixty-day Notice of Intent to File Suit for Violations of the Clean Water Act

Appendix 2

Dear Chief Tidwell, Supervisor McNair, Secretary Vilsack, and Secretary Salazar:

I am writing on behalf of Alliance for the Wild Rockies (AWR) and the Selkirk Conservation Alliance (SCA). AWR and SCA intend to file a citizen suit pursuant to Section 505(a) of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. Section 1365 (a). AWR and SCA hereby give notice, pursuant to Section 505 (b) of the CWA, 33 U.S.C. Section 1365 (b), that the USDA Forest Service has violated and continues to violate the conditions of the National Pollutant Discharge Elimination System (NPDES) as required by the CWA and its Implementing regulations.

On December 4, 2009, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Roads Project, and on May 10, 2010, the Forest Supervisor of the Idaho Panhandle National Forests approved the implementation of the Lakeview-Reeder Fuels Reduction Project. AWR and SCA have reviewed public file documents available on the USDA Forest Service website for the Lakeview-Reeder HFRA Project and have identified reporting, monitoring, and compliance violations. If you have information that indicates the violations listed in this notice did not occur or are incorrectly stated, please immediately respond and specify to which violation that information applies. AWR and SCA intend to file suit at the end of the sixty (60) day notice period to enforce compliance against these violations as well as any additional violations that AWR and SCA may discover.

Appendix 2

AWR and SCA are non-profit organizations dedicated to the protection of natural resources in the Northwest. AWR and SCA members regularly use and enjoy the waterways in Idaho, which are impaired by the discharge of pollutants through stormwater runoff from logging roads. The Forest Service has an obligation under the CWA to regulate its stormwater discharges from these logging roads.

Violations of NPDES Permit Requirements for Point Source Discharge

Stormwater Runoff from Logging Roads

Road work is proposed throughout the Lakeview-Reeder Project area, including road maintenance, road construction, and road storage and decommissioning. Major watersheds in the Project area are Granite Creek, Reeder Creek, and Kalispell Creek. Each of the streams in the project area is listed by the State of Idaho as impaired and not fully supporting beneficial uses. Kalispell Creek and Reeder Creek both have approved Total Maximum daily Loads (TMDL) for sediment. The Project would increase sediment delivery to these at-risk streams, thereby reducing water quality and impairing beneficial uses.

Stormwater runoff from logging roads deposits large amounts of sediment into streams and rivers. Much of this sediment is created by logging trucks hauling timber over roads and grinding up surface gravel and dirt. This sediment is then channeled away from road areas by ditches and culverts and eventually discharged into

streams and rivers. The sediment adversely affects fish by disrupting eggs, decreasing oxygen levels, increasing stream temperature, and interfering with feeding.

This stormwater runoff, collection, and discharge is a point source discharge subject to the NPDES permit process under the CWA. Sections 301 (a) and 402 of the CWA prohibit the discharge of any pollutant from a point source into navigable waters of the United States without a NPDES permit. The USDA Forest Service has violated the CWA and its implementing regulations by not obtaining permits for stormwater runoff that flows from logging roads into systems of culverts, ditches, and channels and then into forest streams and rivers.

Conclusion

If the above described violations are not cured, AWR and SCA intend to file suit under the CWA after the mandated sixty (60) day notice period to protect Idaho water resources and the interests of the AWR and CWA users who regularly use them, The intent of this action is to require the USDA Forest Service to come into full compliance with CWA requirements, particularly the NPDES permit process. In filing this action, AWR and CWA Intends to seek Injunctive relief as well as costs, attorneys' fees and litigation expenses as authorized by 33 U.S.C. Section 3.365(d).

If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact us.

Appendix 2

Persons Giving Notice

The full names, addresses, and telephone numbers of the parties providing notice are:

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The attorneys representing the parties in this notice are:

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Sincerely,

Dana M. Johnson, Attorney
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